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In the
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, COLORADO, INDIANA, KANSAS, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, AND WYOMING, AND THE STATE OF WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Clean Air Act's provision for expedited judicial review of "final action" promulgated by EPA, 42 U.S.C. §7607(b), stripped the courts below of authority to consider a new interpretation of EPA's 1980 New Source Review rules that was developed and imposed in an enforcement action initiated in 1999; and

2. Whether EPA unlawfully interpreted its New Source Review rules to convert existing electric generating plants into "new sources," even though those plants had not undergone "modifications" as that term has been defined and used for decades under those rules and under the Act.

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In the Clean Air Act, Congress assigned to the States the primary responsibility for the day-to-day regulation of air pollution. "In the proper discharge of their responsibilities to implement the [Act] in different conditions and localities nationwide, the States maintain permanent staffs within specialized agencies." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 516 (2004) (Kennedy, J., dissenting). These state environmental regulators are committed public servants who "take pride in their own resourcefulness, expertise, and commitment to the law ...." *Id.*

The amici States oppose EPA's sweeping, enforcement-inspired interpretation of the Clean Air Act's NSR/PSD provisions for three reasons, all of which relate to the States' role as the principal front-line enforcers of the Act's requirements. Specifically, EPA's current reading –

- Contradicts EPA's earlier interpretations and, indeed, EPA's past guidance to state regulators;
- Envisions a breathtaking transfer of enforcement authority from the States to the federal government and thus undermines the Clean Air Act's federalism-respecting foundations; and
- Risks needlessly overwhelming the limited resources available to state environmental agencies.

This Court should reject EPA's current interpretation-qua-litigating-position. Doing so will encourage principled agency decisionmaking, preserve the state-federal balance, and ensure a robust, yet manageable, NSR/PSD program.

SUMMARY OF THE ARGUMENT

EPA's current litigating position concerning the Clean Air Act's NSR/PSD rules (1) flatly contradicts its own earlier interpretations and guidance to States, (2) violates the fundamental principles of federalism that underlie the Act, (3) risks needlessly overwhelming the state regulators who

are responsible for the Act's day-to-day implementation, and (4) entails hidden pitfalls even as a matter of environmental policy. The Court should reject it.

1. EPA's litigating position (which, with respect, is all it is) is not entitled to deference, for two reasons. First, EPA has consistently blessed state environmental regulators' NSR/PSD interpretations contrary to the one it now urges. The Alabama Department of Environmental Management's experience is illustrative: Consistent with express EPA guidance, ADEM initially interpreted – and has since then consistently interpreted – its own NSR/PSD rule to require an increase in a unit's hourly emission rate as a prerequisite to "major modification" analysis. Despite its constant supervision of ADEM's program (right down to its review of individual NSR/PSD permits), EPA has never once suggested that ADEM misunderstands the rules' text or purpose. Second, and more generally, EPA's own approach to the rules here at issue has been frightfully inconsistent. Indeed, during the last 25 years, EPA has at seven different junctures offered at least three different and mutually exclusive interpretations of those rules.

2. On two grounds, EPA's enforcement-inspired interpretation undermines the Clean Air Act's carefully calibrated state-federal enforcement scheme, which charges the States with primary enforcement responsibility. First, because under it, nearly *every* change made to *every* component of *every* sub-par unit would trigger application of stringent new NSR/PSD emission-limit requirements, EPA's sweeping reading would cause the exception of federal intervention to swallow the rule of state control. Second, there is a straightforward – and federalism-respecting – solution for States that want tougher new-source controls: they should simply enact them as a matter of state law. The Clean Air Act establishes a baseline of protection sufficient to safeguard human health and safety, but by its own terms it also expressly invites States to tighten requirements as they see fit and thus act as Brandeisian "laboratories."

3. EPA's litigating position – which, again, would make nearly every tweak to an existing plant the occasion for rigorous pre-construction review – is also wildly impractical. Our chief concern here is the overwhelming burden with which EPA's current interpretation would saddle the state regulators tasked with the ground-level enforcement of Clean Air Act requirements. If on top of their existing duties – developing and implementing SIPs and processing NSR and PSD applications under current law – state regulators had to deal with the flood of new requests that EPA's current view would unleash, the burden would overwhelm existing resources, leading either to an administrative breakdown, a bureaucratic explosion, or both.

4. Important public-policy considerations counsel against EPA's litigating position, as well. First, of course, there is the sheer expense (*i.e.*, the permitting process itself plus the required retrofits) that EPA's current view would entail. Our concern here is less with industry costs as such than with the near-certainty that industry would simply pass its own increased costs on to consumers in the form of rate hikes. That concern is particularly acute where, as here, the affected consumers are utility rate-payers, whose interests state Attorneys General are statutorily obliged to protect. Second, there are good clean-air reasons to oppose EPA's enforcement position. The cost – in money, time, and labor – of EPA's enforcement initiative will create what EPA itself has called a "perverse" incentive for industry to eschew upgrades in favor of limping by on old, deteriorating, and environmentally-unfriendly equipment.

5. Petitioners' jurisdictional argument clearly misses the mark. Section 307(b) encompasses only challenges to "promulgat[ions]" of "nationally applicable regulations" and other EPA "final action[s]." This case, which concerns the propriety of EPA's application of its NSR/PSD rules in the context of an ongoing enforcement action, involves no such challenge. Moreover, it simply cannot be the law that when EPA itself initiates an enforcement proceeding in district court, the target is faced with the choice of either (1)

declining to defend and accepting an adverse judgment or (2) instituting a duplicative proceeding in the D.C. Circuit.

ARGUMENT

This brief is no apology for industry. In a perfect world, with blank statute books and unlimited resources, the amici States might opt for the type of enforcement agenda EPA is pursuing here. Our disagreement with EPA (with one notable exception) is less about environmental policy than about the legality and real-world practicality of EPA's current enforcement initiative. As matters now stand, EPA's actions are both illegal and wildly impractical.

I. EPA's Current Litigating Position Is Not Entitled to Deference, Particularly Given EPA's Consistent En7 dorsement of State Agencies' Longstanding PSD Inter7 pretations to the Contrary.

We start with the question of legality. The notion that there is only one plausible reading of the Clean Air Act's 1980 PSD rule,[1] requiring intensive pre-construction review based solely upon a projected increase in a plant's hours of operation (Pet. Br. 2, 25, 34, 49; EPA Br. 13, 19-20; NY Br. 7), is, as we will explain, plainly wrong. So, too, is the related suggestion that EPA has had anything like a "longstanding" interpretation (Pet. Br. i; NY Br. 1; NJ Br. 2) to that effect.[2]

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[1] 45 Fed. Reg. 52,676 (Aug. 7, 1980) (codified at 40 C.F.R. §51.166 (1987)).

[2] To its credit, EPA *itself* does not even claim here to have had a longstanding position concerning the meaning of the 1980 PSD rule. And with good reason; as we will show, EPA's own reading of the rule has been anything but consistent. *See infra* at 10-14. Indeed, even its brief in this Court seems more than a bit schizophrenic. At one point, for instance, EPA asserts that "[t]he *only reasonable construction* of the PSD regulations is that a physical change that increases a source's hours of operation is a 'modification.'" EPA Br. 20 (emphasis added). A bit later, EPA says, quite differently, that "it would have been *permissible* for EPA to" construe the term "modification" for PSD purposes the way it is used in the NSPS program, *i.e.*, to require an increase in the hourly rate of emissions. *Id.* at 35.

Duke itself has made the textual case against EPA's current reading of the 1980 PSD rule (Duke Br. 33-36), and there is no point in replowing that ground here. Our purpose is to demonstrate that EPA's current hours-of-operation-based litigating position does not warrant deference (1) because the agency has consistently blessed state environmental regulators' interpretations to the contrary; and (2) more generally, because it is just the latest in a bob-and-weave succession of contradictory agency pronouncements.

A. EPA Has Consistently Blessed State7Agency PSD Interpretations Contrary to the One It Now Ad7 vances.

As Justice Kennedy recently observed, "[i]n the proper discharge of their responsibilities to implement the [Clean Air Act] in different conditions and localities nationwide, the States maintain permanent staffs within specialized agencies." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 516 (2004) (Kennedy, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting). "These state employees, who no doubt take pride in their own resourcefulness, expertise, and commitment to the law, are the officials directed by Congress to make case-by-case, site-specific, determinations under the Act." *Id.* In the State of Alabama – whose experience is described below merely for purposes of illustration – the agency to which Justice Kennedy's observation refers is the Alabama Department of Environmental Management ("ADEM").

From the very beginning, ADEM has understood that PSD "major modification" review is triggered only by activity that causes an increase in a plant's hourly rate of emissions and not, importantly, by a recovery or extension of the plant's hours of operation. ADEM first promulgated PSD regulations in January 1981. Later that same year, those regulations were expressly "approv[ed]" by EPA as "comply[ing] with the latest guidance issued by EPA to assist States in preparing State implementation plan (SIP) revisions for PSD." 46 Fed. Reg. 55,517 (Dec. 10, 1981) (codified at 40

C.F.R. §52.50). As both ADEM's current Air Division chief (since 1996) and his predecessor (chief from 1982 to 1996) have testified, ADEM's EPA-approved PSD regulation has always "focused on the maximum hourly rate of emissions," such that "[o]nly if the maximum hourly rate of emissions increased as the result of a project or activity could the activity potentially trigger PSD requirements." Decl. of Richard E. Grusnick, Former Chief, ADEM Air Division ("Grusnick Decl."), ¶9, in *United States v. Alabama Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005) (App. A to this brief). In other words, ADEM has at all times read its PSD regulation to mean that "major modification" review is triggered only by "those projects or activities that increase the maximum capacity of a unit or facility to emit more pollution on an hourly basis," and, equally importantly, not by "a project or activity that is followed by an increase in the availability or utilization of a facility." Decl. of Ronald W. Gore, Chief, AEDM Air Division ("Gore Decl."), ¶¶5, 7, in *Alabama Power*, 372 F. Supp. 2d 1283 (App. B to this brief).

Notably, ADEM's understanding and application of the term "major modification" – *i.e.*, to focus exclusively on activity that results in an hourly-rate increase – "has not changed substantively since [the PSD rule's] original adoption in 1981." Grusnick Decl. ¶10. Indeed, ADEM's interpretation of the PSD regulation has been a model of consistency. Only three individuals have headed ADEM's Air Division since the PSD program came onto the scene in 1980. Under their principled leadership – and through the tenures of seven different Governors (four Democrats and three Republicans) and six different Attorneys General (three of each party) – ADEM has persisted in its hourly-rate-based understanding of the "major modification" analysis.

ADEM has interpreted its EPA-approved PSD regulation to focus on hourly-rate increases and to exclude hours-of-operation increases not only because that is the most sensible reading of the regulation's language but also, and more significantly for present purposes, because *that is how EPA itself said to interpret it.* In January 1981, and then again in

June of that same year - just about the time ADEM was requesting and obtaining EPA's blessing for its own PSD regulations - EPA's Director of Stationary Source Enforcement, Edward Reich, confirmed in two separate memoranda that PSD applicability "is determined by evaluating any change in [hourly] emissions rates caused by" a physical or operational change. JA 28. The reason, Reich explained, was that, otherwise, "[a]ctual emissions could increase only if there is an increase in the production rate or hours or operation, both of which are specifically exempt from PSD review." *Id.* (citing 40 C.F.R. §52.21(b)(2)(iii)(f)); *accord* JA 35 ("[I]n the absence of any SIP or permit limitations," the "increase in hours of operation at the power plant" would not "be considered a modification.") (citing 40 C.F.R. §52.21(b)(2)(iii)(e) and (f)).[3]

To precisely the same effect, just a year later, EPA's regional chief of the Air & Waste Management Division, James Wilburn, issued a report "to all state and local agency directors" - *i.e.*, to agencies like ADEM - one purpose of which was to alert state regulators to "interpretations of EPA regulations." U.S. EPA, Region IV, Memorandum No. 4AW-AM, at 1 (July 12, 1982) (App. C to this brief). The report addressed the very question presented here, and answered it decisively in favor of ADEM's understanding:

> *Question*: A source to be modified will be subject to PSD due to a significant increase in SO_2 emissions. After the modification there will be no increase in the hourly particulate emissions. The source presently operates at 4,000 hours per year. If the PSD permit would allow 7,000 hours per year, would this be judged a significant increase in particulate emissions,

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[3] The concerted efforts to marginalize Mr. Reich as just some guy - or, worse, a rogue bureaucrat - are disingenuous. *See* EPA Br. 13 ("mid-level EPA official"); NY Br. 18 ("single agency employee"). Mr. Reich was not just some guy, he was *the* guy - the director of the very EPA division whose responsibility it was to speak to the correct interpretation of the PSD regulations.

> and cause the source to be subject to PSD for particulate?
>
> *Answer*: No. Since the modification does not *cause* any increase in [the referenced hourly particulate] emissions, no increase in annual emissions should be calculated.

Id. at 2. Notably, North and South Carolina, like Alabama, are in EPA "Region IV"; accordingly, the state regulators whose permitting decisions are being second-guessed in this enforcement action presumably received Mr. Wilburn's directive, as well. What is more, North and South Carolina, like Alabama, adopted their own PSD rules (and obtained EPA approval) during the Reich-Wilburn era. *See* 47 Fed. Reg. 7836 (Feb. 23, 1982) (North Carolina); 47 Fed. Reg. 6017 (Feb. 10, 1982) (South Carolina).

It should be enough that agencies like ADEM acted against the backdrop of EPA's own programmatic advice in crafting and implementing state PSD regulations. But there is much more. Having initially approved ADEM's PSD rules as in "compl[iance] with the latest guidance issued by EPA" concerning the PSD program and codified those rules into federal law (*supra* at 5), EPA has during the last 25 years repeatedly blessed ADEM's hourly-rate-based understanding of its PSD regulation. Initially, and most generically, as an exercise of its "oversight responsibility to ensure that the state program satisfied the requirements of the Clean Air Act," EPA "would periodically issue policy memoranda which would provide EPA's guidance on major air program policy issues." Grusnick Decl. ¶16. None of those documents, however, ever "communicate[d] to ADEM the interpretations of PSD preconstruction permitting requirements that [EPA] advances" in the present enforcement initiative. *Id.*

More specifically, "EPA had numerous, regular opportunities to identify ADEM's policies and offer suggestions in the event it disagreed with ADEM on a point of interpretation." *Id.* ¶17. First, EPA conducted "annual on-site audit[s] of ADEM's Air Program"; these audits "generally included a

mid-year review where Regional EPA staff members would visit ADEM, meet with staff, perform file reviews of individual plants, and review other records." *Id.* Second, as part of the "federal grant process" there was an "annual negotiation of commitments between EPA and the state" during which EPA could identify topics of "high priority" and leverage "commitments from ADEM." *Id.* Third, and separately, EPA and ADEM negotiated annual Clean Air Act enforcement agreements covering all aspects of compliance and enforcement, including, the PSD program. Significantly here, these agreements stressed the importance of EPA and ADEM "resolving disputes, *especially differences in interpretation of regulations or program goals as they may affect resolution of individual instance[s] of non-compliance.*"[4] The agreements also provided that EPA and ADEM would "conduct monthly conference calls" as a means of ensuring a coordinated enforcement strategy.[5] Tellingly, "[n]o audit or grant discussion ever targeted implementation of the modification provisions of the PSD regulations consistent with EPA's current interpretation." Grusnick Decl. ¶18.

Finally, and more specifically still, as part of what this Court has called its "sweeping" "surveillance," "oversight," "supervisory," and "checking" responsibilities, *see Alaska*, 540 U.S. at 469, 484, 485, 486, 487, 488, 490, 492, 496, 502, EPA routinely reviewed individual PSD permits issued by ADEM. To facilitate that review, the Clean Air Act itself required ADEM to inform EPA specifically of "'every action' taken in the course of the permit approval process" and further guaranteed EPA the right to submit comments concerning proposed permits. *Id.* at 508 (Kennedy, J., dissenting) (quoting 42 U.S.C. §7475(d)). Moreover, as illustrated by the *Alaska* decision itself - the central premise of which is that EPA can and should look over state agen-

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[4] Alabama/EPA Compliance Assurance Agreement 2 (1996) (emphasis added) (Appendix D to this brief).

[5] *Id.* ADEM's files contain similar agreements for 1986, 1989, and 1990.

cies' shoulders to ensure the proper administration of the PSD program - EPA could always have vetoed ADEM's issuance of a permit or otherwise moved to block a change authorized by ADEM. *See id.* at 473-74, 480-81 (majority opinion). Tellingly, it never did.

The point here is simply this: Knowing full well ADEM's hourly-rate-based understanding of the PSD modification rule (and, indeed, having counseled ADEM to embrace that understanding to begin with), it was incumbent upon EPA to speak up if it thought ADEM's understanding or application of that rule was out of whack. Despite hundreds of opportunities, EPA never did so. Of course, if EPA believed ADEM was way off track (and there is, to be sure, a *huge* practical difference between ADEM's consistent interpretation and the one that EPA urges in this litigation), it could have issued a "SIP call" requiring ADEM either to change its ways or to forfeit its permitting authority altogether. *See* 42 U.S.C. §7410(c)(1), (k)(5). But ADEM never received so much as a tap on the shoulder. By now pulling the rug out from underneath ADEM 20 years after the fact, EPA has "indulge[d]" in precisely the "inequitable conduct" this Court implicitly forbade in *Alaska*, 540 U.S. at 495. *See also id.* (emphasizing that it is essential for EPA "to act on a timely basis" if it is going to second-guess state regulators); *id.* at 513 (Kennedy, J., dissenting) (recognizing the "need for finality in state permitting decisions" and that "a post hoc veto procedure" upsets "reliance and expectation interests").

B. EPA's Own Pronouncements Concerning the PSD Rule Have Been Frightfully Inconsistent.

Alabama's interpretation of the PSD rule's modification provisions – *i.e.*, to hold hours of operation constant and to require as a prerequisite to "major modification" analysis an increase in the hourly emission rate – is thus not only EPA-blessed but also truly longstanding and consistent. EPA itself cannot make a similar claim. It has, with respect, been all over the map. Presently, of course – by which we mean

currently in the life of this particular enforcement proceeding - EPA advances a so-called "actual-to-projected-actual" understanding of the 1980 PSD rule. Pursuant to *that* interpretation, an increase in annual emissions may be triggered by an increase in a source's hours of operation standing alone, that is, even absent an increase in the source's hourly emission rate or, indeed, despite a decrease in that rate. *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 640 (M.D.N.C. 2003) (describing EPA's position).

That has not always been EPA's view. In fact, since its adoption in 1980, EPA has advanced *at least three different and mutually exclusive interpretations* of the PSD rule. Tracing the evolution can be a dizzying exercise:

> ***Take One***: Initially, in 1981, EPA endorsed the so-called "actual-to-actual" test (used, *e.g.*, by ADEM), pursuant to which a "major modification" occurs only where activity increases a unit's hourly emission rate. *See supra* at 5-8.
>
> ***Take Two***: Then, in its 1988 "WEPCo determination," EPA asserted that the "actual-to-potential" test, pursuant to which post-change emissions are theorized by multiplying a unit's maximum emission rate by the total number of hours in an entire year, was the *only* permissible way to measure PSD modifications. In so asserting, EPA stated categorically that the 1980 PSD regulations "provide no support for" the actual-to-projected-actual test that it now urges. JA 256 n.7.
>
> ***Take Three***: In the wake of the Seventh Circuit's rejection of its actual-to-potential test, *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 917 (7th Cir. 1990) - and, seemingly, that court's instruction to apply an actual-to-actual test using "present hours and conditions," *id.* at 918 n.14 - EPA went back to the drawing board. It did not, however, return to its actual-to-actual interpretation but, instead, embraced the very actual-to-projected-actual test it had earlier insisted had "no support" in the regulation. JA 66-72.

Take Four: In its 1992 "WEPCo Rule," EPA formally adopted the once-rejected actual-to-projected-actual test for measuring emissions but, curiously, made it optional and available only to utilities. *See* 40 C.F.R. §51.166(b)(21) & (b)(32) (1993).

Take Five: Then, in 1998, EPA asserted in a proposed rule that the actual-to-potential test (abandoned after *WEPCo*) was and had always been the sole means of measuring emissions increases for PSD purposes - at least for non-utility sources. *See* 63 Fed. Reg. 39,857, 39,859 n.4 (July 24, 1998).

Take Six: In 2002, EPA promulgated a new, mandatory actual-to-projected-actual methodology for all existing sources (not just utilities) and, in so doing, reiterated its view that the actual-to-potential test remained the governing standard under the preexisting 1980 PSD rule. *See* 67 Fed. Reg. 80,186, 80,191-92, 80,199 (Dec. 31, 2002).

Take Seven: Finally, in litigating this very case, EPA initially invoked the actual-to-potential test as the appropriate means of measuring increases under the 1980 rule, but appears to have settled, at last, on a version of the actual-to-projected actual analysis. *See Duke Energy*, 278 F. Supp. 2d at 640 & n.17.

In the words of its own former general counsel, EPA's current "multi-billion dollar" NSR/PSD enforcement initiative rests "on the premise that the same words in the law meant one thing in 1985, another thing in 1992, still another in 1996, yet another in 1998, and will someday mean something still different in the future." *Joint Hearing on NSR Issues Before the Senate Environment and Public Works Comm. and the Senate Judiciary Comm.*, 107th Cong., pp. 2-3 (July 16, 2002) (statement of E. Donald Elliott) ("Elliott NSR Test."). It is a dubious premise.

As a *practical* matter, New Jersey is exactly right when it says that "[t]he States' ability to plan for and meet their obligations under the CAA depends on the stability of

nationwide regulations." NJ Br. 8. The problem is that EPA's approach to the NSR/PSD rules has been anything but "stab[le]." Quite the contrary, EPA's "many changing interpretations of NSR over the years have created a legal mess of baffling complexity ...." Elliott NSR Test. at 1.

More importantly, as a *legal* matter, EPA's "zigs and zags represented by its contradictory post-WEPCO statements and rules" and its failure to speak "with one voice, or a consistent voice, or even a clear voice, on this issue," *Alabama Power*, 372 F. Supp. 2d at 1306, fatally undermine its claim to deference. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). That is particularly true where, as here, the agency's interpretation has "fluctuated" even "as [the] case has progressed." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 n.29 (1982).

It is true, of course, that "[a]n initial agency construction is not instantly carved in stone." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863 (1984). But it is equally true that "'[o]nce an agency gives its regulation an interpretation'" – which, the case law reflects, it may do either through regional guidance determinations (*e.g.*, the Wilburn memo) or, a fortiori, through formal, central-office guidance (*e.g.*, the Reich memos) – "'it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.'" *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997)) (finding that FAA had unlawfully changed an interpretation earlier adopted by its Alaskan Region); *accord, e.g., Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 737 (3d Cir. 1999) (Alito, J.). Given that its current, enforcement-inspired interpretation of the 1980 PSD rule contradicts its earlier view (or *views*, as the case may be), EPA's position here can be understood only as a "convenient litigating position," to which no deference is due. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

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It is worth pausing briefly to take stock of the story that EPA's present enforcement initiative - and the newfound view of the NSR/PSD rules that underlies it - requires the Court to believe. The current batch of enforcement actions alleges rampant, if not near-universal, non-compliance with NSR/PSD rules stretching back some 20 years. How, on EPA's retelling, did we get to this point? *First*, we must assume that nearly every major utility-industry player (and, more particularly, every major player's lawyers) either fundamentally misunderstood or blatantly ignored EPA guidance on the meaning of the term "major modification." *Second*, and worse, we must assume that the state environmental agencies that reviewed and approved the hundreds of building projects now under challenge (ADEM in Alabama Power's case, the North Carolina Department of Environment and Natural Resources in Duke's) likewise either misunderstood or ignored EPA guidance. *Finally*, and most bizarrely, we must assume that the EPA regulators themselves, whose very business it was to look over the States' shoulders, were (at best) asleep at the wheel. EPA's story here is either an elaborate conspiracy theory or a monument to bureaucratic incompetence. Occam's Razor suggests a different explanation: EPA's current litigating position just wasn't the prevailing understanding of NSR/PSD applicability during the two decades that preceded the current enforcement initiative's launch in 1999.

II. EPA's Litigating Position Undermines the Clean Air Act's Carefully Calibrated State/Federal Enforcement Scheme.

Congress enacted the Clean Air Act with federalism firmly in mind. There are two important federalism-related points worth making here, neither of which the state amici supporting petitioners seem to have come to grips with. First, whereas the Act makes States primarily responsible for regulating air pollution, and carves out NSR/PSD as a narrow exception to that general rule of state control, the

position advocated by petitioners and their state amici would reverse matters entirely. It would make almost every tweak to an existing source the occasion for intrusive federal review and intervention. Second, by its very terms, the Clean Air Act establishes only a regulatory baseline; States with the desire and the gumption can *always* enact tougher environmental controls. States that have declined to do so have no standing to complain.

A. Under EPA's Litigating Position, the Exception of Federal Intervention Would Swallow the Rule of State Control.

It is a well-recognized fact, as the state amici supporting petitioners seem to appreciate, that the Clean Air Act "relies on a close and equal partnership between federal and state authorities to accomplish congressional objectives." *Alaska*, 540 U.S. at 518 (Kennedy, J., dissenting). In the cooperative scheme established under the Act, States do not play "the role of mere provinces or political corporations" but, "instead, of coequal sovereigns entitled to the same dignity and respect." *Id.* Indeed, the Act's language itself makes clear that "air pollution prevention ... and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. §7401(a)(3) (emphasis added); *see also id.* §7407(a) (States have "primary responsibility").

Pursuant to the scheme that Congress established, EPA initially sets national ambient air quality standards ("NAAQS") to protect public health and welfare, 42 U.S.C. §7409, and States, in turn, develop detailed state implementation plans ("SIPs") that specify schedules, compliance timetables, and emission limitations for specific sources, including electric utility plants, *id.* §7410(a). States must include in their SIPs a program for pre-construction review of construction activity that creates new pollution, the aim being to ensure that pollution *not* originally accounted for under a SIP is reviewed and regulated to protect the NAAQS before it is emitted. *Id.* §7410(a)(2)(D). EPA must approve a SIP if it meets the criteria specified in §7410(a).

See Train v. NRDC, 421 U.S. 60, 78-79 (1975).

As a result of the state-federal balance that Congress struck, EPA is generally forbidden to micromanage state emission-control policies with respect to existing sources. Rather, while EPA is "plainly charged by the Act with the responsibility for setting" the NAAQS, "[j]ust as plainly ... it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* at 79. Congress gave EPA "no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards" of §7410(a). *Id.* Rather, so long as the "ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air," a State is "at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id.*; *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which [existing] sources would be burdened by regulation and to what extent.").

The NSR/PSD rules at issue here constitute a narrow exception to the general rule under the Act that States have primary responsibility to determine whether and how to regulate pollution sources. Indeed, in *Train*, this Court specifically referred to the emission limits imposed by the Act's New Source Performance Standards ("NSPS") provisions, *see* 42 U.S.C. §7411, as an "[e]xception[]" to EPA's decidedly "secondary role" in "the process of determining and enforcing the specific, source-by-source emission limitations." 421 U.S. at 78 & n.16. When enacting the NSPS program, Congress considered a more sweeping program that would have subjected existing sources, as well as new, to federally-established limits. Significantly, though, noting cost considerations and the difficulty of retrofitting existing sources, Congress opted not to pursue that course, *see* S. Rep. No. 91-1196, at 15-16 (1970); instead, while requiring

new sources to install the latest control technologies, Congress left existing sources subject to state-established SIP limits. *See* 116 Cong. Rec. 42,520 (1970). The *Train* Court's emphasis on NSPS exceptionalism, of course, carries over jot-for-jot to the NSR/PSD program at issue here, for the simple reason that the NSR program defines the term "modification" - which for present purposes is what triggers new NSR-driven emission limits and thus displaces traditional state control - by reference to the NSPS program's use of the same term. *See* 42 U.S.C. §§7479(2)(C), 7501(4). *See also Alaska*, 540 U.S. at 491 (even the PSD program "places primary responsibilities and authority with the States, backed by the Federal Government").

EPA's position here turns the Clean Air Act on its head and causes the exception of federal intervention to swallow the rule of state control. Under EPA's current regulatory interpretation, the rigorous NSR/PSD permitting process (and the establishment of new emission limits) would be triggered by any physical or operational change to an existing source that facilitated any increase in hours of operation and thereby increased annual emissions - even without a corresponding hourly-rate increase or, for that matter, despite an hourly-rate decrease. But of course nearly *every* repair or replacement of damaged, deteriorating, or malfunctioning equipment will result in an hours-of-operation increase (that being the point of the repair) and thereby - assuming constant, or even marginally reduced, rates of emission - result in an increase in actual emissions. Accordingly, under EPA's view, nearly *every* physical change made to *every* component of *every* sub-par unit would trigger application of new NSR/PSD requirements. (Indeed, when wearing its rulemaking hat, EPA has recently and candidly conceded that its position "in briefs in various enforcement-related cases" - presumably a reference to

cases like this one - would make "virtually all changes, even trivial ones," subject to NSR requirements.[6])

The risk is not hypothetical. Take, as just one example, a 1996 enforcement proceeding brought by EPA against the Georgia-Pacific Corporation. There, EPA alleged that Georgia-Pacific had, at a number of its plants (two of which were in Alabama), engaged in "construction" or "major modification" activity without the required PSD permits. *See* Consent Decree at 1, *United States v. Georgia-Pacific Corp.*, No. 1 96-CV-1818-FMH (N.D. Ga. July 18, 1996). That enforcement proceeding was resolved pursuant to a consent decree, which constituted "full settlement" for, among other things, the PSD "modifications" listed in an appendix to the decree. *Id.* at 35-36. The catalogue of charged "modifications" spans 54 pages, numbers 994 individual items, and stretches back some 19 years. *Id.* Schedule C. Many of the items on the list - *e.g.*, "Resin/glue reformulation," "Auxiliary feed screw installed," "Single head sander," "patchline," "Ramp for loading mulch" - hardly seem like the sorts of changes Congress had in mind when used the term "modification" as the statutory trigger for rigorous federal PSD review. *Id.* Schedule C at 1, 3, 9, 11, 14.[7]

The point here is not, as a policy matter, that more or less stringent controls are preferable. Rather, the point is that in the light of the Clean Air Act's federalism-respecting underpinnings, this Court should be slow to assume that Congress could possibly have intended to permit such a wholesale

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[6] 68 Fed. Reg. 61,272 (Oct. 27, 2003), *vacated*, *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

[7] Importantly, under petitioners' and EPA's view of the law (as articulated in the lower courts), these changes likely would *not* be exempt from PSD review under 40 C.F.R. §51.166(b)(2)(a)(iii)'s "routine maintenance, repair and replacement" exclusion. And therein lies the practical problem with petitioners' and EPA's arguments: They would make PSD applicable "to virtually any capitalized maintenance or repair project that prevented enough downtime to breach the emissions increase thresholds." *Alabama Power*, 372 F. Supp. 2d at 1297.

transfer of regulatory responsibility from the States to the federal government.

B. There Is a True Federalism7Respecting Solution Here: If a State Wants Stricter New7Source Con7trols, It Should Simply Enact Them.

The amici States backing petitioners and the EPA here invoke the value of federalism to support their positions. *See, e.g.*, NJ Br. 1, 5, 10; NY Br. 1. It is not, with respect, a notion of "federalism" with which we are familiar. It is, as we will show, federalism-in-reverse.

The genius of federalism, properly understood, is perhaps best captured by Justice Brandeis' famous "laboratory" metaphor: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *accord, e.g., United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). In other words, federalism leaves States free to make tough social-policy decisions *for themselves*. As we will explain, the Clean Air Act accommodates - indeed, encourages - Brandeisian, laboratory-style federalism. But New York, New Jersey, *et al.*, seem to have a far more ambitious program in mind. Rather than making decisions *for themselves*, they want to upload their own notions of good environmental policy into federal law and thereby export them to *everyone else*. Whatever kind of solution that may be, it is not one that can be squared with - indeed, it is one that subverts - traditional federalism principles.

Petitioners' state amici's mistake, moreover, is not just one of terminology. New York's brief opens with a warning about the "dire ramifications" of emissions from "uncontrolled plants," which, it says, "kill tens of thousands of Americans annually and sicken hundreds of thousands of others." NY Br. 3. But that argument, with respect, is a straw man, as is any suggestion that affirmance here would

allow plants to "proceed without any scrutiny by the States." NY Br. 2. By its own express terms, the Clean Air Act sets only a *baseline* of protection. That is, it imposes *minimum* compliance requirements and explicitly invites States to tighten them as they see fit. As relevant here, §116 of the Clean Air Act unambiguously provides that -

> nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. §7416. The message is clear: States may of their own accord adopt emissions limitations (here, PSD requirements) that are more rigorous than those established by federal law (here, the Clean Air Act's own PSD rules). *See Union Elec.*, 427 U.S. at 256-57 (Clean Air Act "subject[s] the States to strict minimum compliance requirements").

The point is simply that if any State at any time wants lower emissions caps or tighter permitting requirements, *it need only convince its Legislature to enact them and its Governor to sign them.* A few "courageous" States, *see New State Ice*, 285 U.S. at 311, of course, have had done just that. In 2002, North Carolina enacted its own "Clean Smokestacks Act," which requires coal-fired power plants to reduce emissions of NOx and SO_2 far more aggressively than federal law - by roughly three-quarters over a 10-year period. N.C. Gen. Stat. §143-215.107D(b)-(d). In addition, the Act specifies that the State's largest utilities "must achieve these emissions through actual reductions at their 14 power plants in the state - not by buying or trading emissions credits from utilities in other states, as allowed under federal regula-

tions." Sec. William G. Ross, Jr., N.C. Dep't of Env't and Nat. Resources, North Carolina's Clean Smokestacks Act, www.ncair.org/news/leg/cleanstacks.shtml. The North Carolina law is thus tougher than federal law on two counts and, indeed, is touted as going "beyond the requirements of the EPA's SIP call." *Id.*

More recently, Maryland, too, enacted a "Healthy Air Act." Md. Code. Ann. §2-1001 *et seq.* Over the course of the next decade, the Maryland law will reduce NOx emissions by 85%, SO_2 by 80%, and mercury by 90%. *See id.* §2-1002; Maryland Department of the Environment, Maryland Clean Power Rule: Frequently Asked Questions, www.mde.state.md.us/Air/md_cpr.asp. Like North Carolina's, Maryland's law prohibits "power plants from acquiring out-of-state emissions allowances (trading credits) in lieu of adding pollution controls locally." *Id.* Thus, like North Carolina's, Maryland's law is in two respects "stronger than current federal plans." *Id.* It means, so its proponents claim, "cleaner air in Maryland." *Id.*

Federalism, therefore, is working just the way the Framers - both of the Constitution and of the Clean Air Act – intended. If New York, for instance, wants to ensure that its own "efforts to prevent air quality from deteriorating" are not "undermine[d]" (NY Br. 1), it should simply redouble them. There are, to be sure, administrative and political costs to enacting tough environmental controls - they are, for better or worse, part of the calculus. What petitioners' state amici cannot do, consistent with the notion of federalism embodied in Clean Air Act §116 (or with any other meaningful notion of federalism, for that matter), is to seek to externalize those costs by free-riding a dubious interpretation of a federal regulation to their preferred policy outcome.[8]

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[8] Finally, if New York (or any other State) believes that emissions from sources in *other* States are contributing to a violation of its own air-quality

III. EPA's Litigating Position Has No Basis in the Real7 World Practicalities of Clean7Air Enforcement.

EPA's interpretation of the applicable PSD rule is, as we have said, not only illegal but also wildly impractical. We want to focus briefly on practicalities.

Again, according to EPA, the rigorous PSD permitting process is activated by any change to an existing source that recovers lost productivity and thereby (even without a corresponding emissions-rate increase or, indeed, despite an emissions-rate decrease) increases annual emissions. The problem, as we have explained, is that on EPA's view, nearly every change, however minor, qualifies, for the simple reason that nearly every repair of a damaged or deteriorating part will allow for an hours-of-operation increase and thereby - assuming constant, or even marginally reduced, rates of emission – result in an increase in annual emissions. Not only would that interpretation result in a breathtaking transfer of regulatory authority from the States to the federal government, but it would also impose a crippling burden both on industry and on the state regulators who would be tasked with its ground-level implementation.

Industry, of course, can speak for itself here. It is enough for our purposes to point out the obvious. Most plants have many units, and most units have many parts. Parts will go down - and thus require repair or replacement – at different and often unpredictable times. If, as our discussion of the Georgia-Pacific consent decree shows (*see supra* at 18), even relatively minor repair-and-replacement activities trigger the PSD review process, that process will go on ad infinitum. Imagine, for instance, that a section of tubes on hypothetical Boiler No. 1 goes down. PSD review is activated. Just as that section is set to emerge from the PSD process, a section on Boiler No. 2 (or perhaps even a different component part on No. 1) goes down, activating a new round of PSD review.

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standards, Clean Air Act §126 provides a specific statutory remedy. *See* 42 U.S.C. §7426.

Given the sheer number of moving parts in the typical plant (*see, e.g.*, the 994 "modifications" cited in Georgia-Pacific's case) and the amount of time it takes to conduct a proper PSD review and to issue a permit, *see, e.g., Alaska*, 540 U.S. at 516-17 (Kennedy, J., dissenting) ("[F]or a complex project, the time for approval can take from five to seven years."), it is easy to see that the reviews would in many instances overlap interminably, leaving plant operators in an inescapable regulatory Charybdis. (The problem would be exacerbated, of course, by the fact that PSD entails a *pre*-construction permit process; so the plant operator wouldn't even be able to begin fixing broken part No. 1 before it got the final green light from regulators, by which point there would probably be a broken part No. 2.)

Of greater and more immediate concern to us is the overwhelming burden with which EPA's interpretation would saddle state environmental regulators. Put simply, state agencies like ADEM would inevitably find themselves unable to keep up. The backdrop here, of course, is everything that state regulators already do. First, there is the development of the initial SIP, which must include (among other things) an EPA-approved PSD provision. *See* 42 U.S.C. §7475(a)(1). SIP development, as New Jersey quite correctly points out, is an "arduous" task. NJ Br. 6. After SIP development comes SIP implementation, which includes, among other things, the issuance to individual facilities of operating permits that specify those facilities' emission limitations and other compliance obligations. Then, there are the individual PSD applications that regulators process under the prevailing understanding of PSD requirements. Even on its less aggressive reading of the PSD rules, for instance, ADEM received, on average, 14 applications per year between 1997 and 2002 - each of which, as we have said, likely took quite some time to process. *See* Presentation: PSD Permit Applications Received by Region 4 (Calendar Year), Annual Joint EPA/State Enforcement Conference (Atlanta 2002).

Add to that the regulatory crush of EPA's sweeping PSD interpretation and the burden would become unsustainable.

Even after managing to educate themselves on the specifics of the new PSD standards, state environmental regulators would face a barrage of new permit applications concerning, among other things, glue reformulations and ramp additions. *See supra* at 18. They would then scramble, on the front end, to initiate dozens upon dozens of new reviews and then, on the back end, to prosecute each and every instance of noncompliance. Given their very limited resources, it is almost inconceivable that many States would be able to do the job, and, in any event, the explosion of bureaucracy would be mind-boggling.[9]

The point is that this case is *not* about increasing permitting loads at the margins. If Georgia-Pacific, for instance, had been obliged to undergo pre-construction review for each of its 994 alleged "modifications," the burden would have overwhelmed both the company and state regulators. The Clean Air Act, again, assigns front-line management responsibility to the States, and the PSD program particularly, given its complexity, indicates Congress' intent to structure an enforcement scheme that is sensitive to the needs and capabilities of state regulators. EPA's reading of the PSD rules is anything but. On its view, primary state control of Clean Air Act regulation would cease to be a "get to" and would become, instead, a "have to."

IV. EPA's Litigating Position Has Fundamental Drawbacks Even as a Matter of Environmental Policy.

We said at the outset that our disagreement with EPA here principally concerns the legality and practicality of its enforcement program, not the environmental policy underlying it. While that is true for the most part, there is an important caveat.

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[9] EPA itself has recognized that the very aggressive NSR/PSD interpretation that it is pursuing in these enforcement proceedings risks overtaxing the "scarce resources" of "State and local reviewing authorities" and that an hourly-rate-based reading would "reduce[] the reviewing authorities' compliance and enforcement burden." 70 Fed. Reg. 61,094 (Oct. 20, 2005).

This case, we should emphasize, does not pit white-knight clean-air advocates against greedy polluters. It's just not that simple. In fact, there are important countervailing consumer-related considerations to weigh against EPA's aggressive reading of the PSD rules, and, indeed, there are very good clean-air reasons to oppose that reading.

1. Initially, and perhaps most obviously, there is the issue of cost. There are two costs worth mentioning here. One, as Justice Kennedy has quite rightly recognized, "is the [permitting] process itself," which, he notes, can require an applicant to "spend up to $500,000." *Alaska*, 540 U.S. at 515-16 (Kennedy, J., dissenting). Another cost, far more significant in dollar terms, is the technology itself. Under the Clean Air Act's PSD provisions, a newly "constructed" (or "modified," *see* 42 U.S.C. §7479(2)(C)) source must ultimately be equipped with "best available control technology," or "BACT." 42 U.S.C. §7475(a)(4). BACT is, as its name implies, the latest and greatest. The price tag can run into the hundreds of millions of dollars per plant.

We have good reason to be concerned about cost, and it's not just because industry would have to spend more. Rather, we are concerned that industry will pass on its own increased costs to consumers in the form of higher, and in all probability *significantly* higher, product prices, monthly bills, and service fees.[10] Of course, as a generic matter, States have an interest in ensuring that their citizen-consumers can afford basic goods and services. Thus, we worry that if, for instance, even *non*-utility sources like saw, paper, and textile mills had to be retrofitted with BACT, the prices for the commodities those mills produce could skyrocket.

The States' interest here is even more acute because this case, like so many major PSD enforcement actions, involves

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[10] Alabama's PSC, for example, has authorized Alabama Power "to adjust monthly billings to recover" costs associated with "compliance with environmental laws, regulations, or other such mandates." Alabama Power Co. Petition for Adjustment of Rate CNP, *Order* at 1, Docket Nos. 18117, 18416 (Nov. 1, 2004).

a *utility*. That fact is significant in two related respects. First, utilities have a statutory duty to provide the consuming public with reliable service. *See, e.g.*, Ala. Code §37-1-49 ("Every utility shall maintain its plant, facilities and equipment in good operating condition .... Every utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under the duty to serve."). In order to meet that responsibility, utilities *must* from time to time repair and replace deteriorating parts. Second, state Attorneys General have a statutory obligation to protect the interests of utility ratepayers. *See, e.g.*, Ala. Code §37-1-16(a) (Attorney General has authority to "intervene[e] in proceedings" before the PSC "on behalf of the using and consuming public" in matters pertaining to, among others, "rate applications, rate changes and curtailments of service").[11] The States' interest, in sum, is in ensuring that their citizens have access to utility services that are both *reliable* and *affordable*.

Accordingly, while clean air is a good, to be sure, it is not a good that can, consistent with competing notions of consumer protection, be pursued at all costs. *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs."). Particularly given the multitude of *other* federal programs aimed at ensuring cleaner air (NSR/PSD, as the EPA seems to acknowledge here, is hardly the linchpin of the Clean Air Act's regulatory apparatus[12]), we think it quite likely that the harm brought

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[11] State Attorneys General take this obligation seriously and intervene on behalf of rate-payers routinely. *See, e.g.*, Alabama Power Co. Petition for Revised Rate ECR Factor, *Order* at 1, Docket No. 18148 (Dec. 15, 2005) (Attorney General intervened "to ensure that any rate increases are fair and equitable to the consumer").

[12] EPA Br. 12 n.3 (listing, among the "new programs that improve air quality," the Acid Rain Program, the NOx SIP Call, and the Clean Air Interstate Rule ("CAIR")). These new pollution-control programs, EPA has said, "are more efficient than major NSR" and will more than offset

on by EPA's enforcement-inspired reading of the PSD rules – particularly for low- and middle-income families, who may find themselves unable to afford next month's power bill – significantly outweighs the benefits.

2. More fundamentally, there are very good clean-air reasons to oppose EPA's position here. The sheer cost – in money, time, and labor – of such an expansive pre-construction permitting process, not to mention the installation of BACT at the culmination of that process, would create an irresistible incentive for industry simply to avoid repairs and replacements whenever and wherever possible, and to continue running plants on old, deteriorating, and *environmentally-unfriendly* components. Almost everyone has been down this road at least once: Your old car emits blue smoke, burns a quart of oil a month, and desperately needs its piston rings replaced. Your mechanic tells you that the job will run you $1800 and that, in any event, he can't do it for two weeks. What do you do? You just keep on driving, of course (and the blue smoke just keeps on pumping). It's simpler, and cheaper, to keep pouring oil into the car. So, too, here, rather than fixing broken parts – which under EPA's litigating position will trigger crippling expenses and production delays – industry players will just keep their plants running on inefficient, environmentally-unfriendly parts.

EPA itself has acknowledged that running plants on deteriorating parts is an invitation to environmental trouble. Indeed, *the whole point* of EPA's recent NSR-reform rulemaking initiative – part of which, of course, is to adopt prospectively the very position we advance here – has been to avoid encouraging plant owners to forego repairs in favor of continued operation using sub-par equipment. *See* 70 Fed. Reg. 61,083 (Oct. 20, 2005) (proposed rule adopting actual-to-actual emission test); 68 Fed. Reg. 61,248 (Oct. 27, 2003) (rule

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any marginal increase in emissions that might result from an hourly-rate-based reading of the NSR modification rules. 70 Fed. Reg. 61,088.

amending "routine maintenance" exclusion), *vacated, New York*, 443 F.3d 880. The reason, EPA has said, is that worn-out parts often lead to "periods of startup, shutdown, and malfunction," which themselves "usually" entail "increased emissions." *Id.* at 61,251. As EPA has explained the problem, because the NSR/PSD permitting process is "time-consuming and expensive" and "will likely result in a requirement to retrofit an existing plant with state-of-the-art pollution controls, which often is very costly and can present significant technical challenges," there is a very real risk that a plant owner "may forego or curtail replacements that would enhance the safe, reliable, or efficient operation of its plant." *Id.* at 61,250; 70 Fed. Reg. 61,093 (same verbatim). According to EPA, the solution - the sound environmental solution, that is - is to remove the "perverse" incentive for plant operators to limp by on deteriorating equipment. 68 Fed. Reg. 61,255; *accord* 70 Fed. Reg. 61,094 (object to "remove disincentives" to making changes that could, among other things, enhance "environmental performance").

The logic is compelling, and it applies precisely here. It is impossible to square with the very different, max-PSD policy that EPA is pursuing in these proceedings.

V. Section 307(b) Does Not Preclude Enforcement7 Proceeding Targets From Defending by Challenging EPA's Application of Clean Air Act Rules.

For two reasons, it seems to us clear that Section 307(b)'s jurisdictional provision has no application here.

1. First, there is the plain text of the statute. Section 307(b)(1) requires that "petition[s] for review" challenging (1) "promulgat[ions]" of "nationally applicable regulations" and (2) other "final action[s]" of EPA be filed in the D.C. Circuit. 42 U.S.C. §7607(b)(1); *accord id.* §7607(e) (§307(b) pertains to "regulations," "orders of the Administrator"). Section 307(b)(2) then states that any action "with respect to which review could have been obtained" in a §307(b)(1) petition for review shall not be subject to "judicial review" in an enforcement proceeding. *Id.* §7607(b)(2). The question,

therefore, is whether Duke's defensive argument that EPA had misapplied the preexisting 1980 PSD rule would have been proper under §307(b)(1).

It would not have been. A civil enforcement proceeding, of course, is not a "petition for review" within the meaning of §307(b)(1). No "promulgat[ion]" of any "regulation" is being questioned here; the pertinent "regulation" here was "promulgated" in 1980. Nor can EPA's current interpretation (qua DOJ litigating position) concerning the 1980 regulation appropriately be considered a "final action." Final agency action, of course, has a stylized meaning in the administrative-law context; to qualify, an agency's pronouncement must, at a minimum, "'mark the consummation of [its] decisionmaking process.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Particularly given EPA's flip-flopping interpretations of the 1980 PSD rule, its current litigating position surely does not make the grade.

Petitioners' and their amici's jurisdictional analysis is, with respect, based on a caricature of §307(b) rather than on a careful reading of its language. New Jersey, for instance, asserts at one point that Congress "demand[ed]" in §307(b) that "the federal minimum requirements" be reviewed exclusively via petition for review in the D.C. Circuit. NJ Br. 8. But that is not at all what §307(b) says; it speaks, instead, solely in terms of "promulgat[ions]," "regulation[s]," and "final action[s]." Edging closer to §307(b)'s text, EPA and other amici stake their argument on the assertion that the Fourth Circuit's decision here "*effectively* invalidates the PSD regulations" themselves and thus triggers §307(b). EPA Br. 29, 31 (emphasis added); *see also, e.g.*, NY Br. 4 ("effectively invalidates"). That argument saddles the adverb with more than it can bear. It depends on the premise that there is only one reading of the PSD regulation that is even plausible – namely, to require PSD review based solely on activity that causes an hours-of-operation increase – and concludes that any disagreement with *that* reading renders the regulation itself a dead letter. As we have shown, however, any

current assertion that the rule *must* be understood to incorporate an hours-of-operation trigger is in the teeth of EPA's own vacillation on the issue. At the end of the day, the fact remains that Duke's argument here comes in defense to an enforcement action that EPA itself initiated in North Carolina. Duke's defense entails only a challenge to EPA's application of the 1980 PSD rule to it, not a frontal assault on the validity of the 1980 rule itself. This is not a §307(b) case.

2. Plain language aside, petitioners' and EPA's reading of §307(b) would beget either grave unfairness, judicial chaos, or both. It simply cannot be the law that where, as here, EPA institutes a civil-enforcement proceeding in a local district court, the targeted defendant is left with the Hobson's choice of either (1) rolling over, not defending itself, and accepting an adverse judgment or (2) instituting an entirely separate and parallel action in the D.C. Circuit. Surely, instead, when EPA itself decides to bring suit against a plant operator in Alabama, for instance, that operator is entitled to defend itself in Alabama, without cluttering the court system with a duplicate action in Washington, D.C. *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (§307(b) does not prevent criminal-enforcement target from defending itself, so long as court does not invalidate EPA's "promulgat[ion]" or the "regulation" itself).

The point is that any anti-forum-shopping policy that might underlie §307(b), *see* EPA Br. 18, has absolutely no application to an enforcement-action *target* like Duke. Here, by contrast, the shoe is on the other foot. Recently, in *Alaska*, this Court emphasized that EPA may *not* seek to "achieve an unfair advantage through its choice of litigation forum." 540 U.S. at 493. Petitioners' and EPA's casual reading of §307(b) – which allows EPA to sue but forbids the target to defend – would encourage EPA to do just that.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals' judgment.

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